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IN THE

# Supreme Court of the United States

October Term, 1972

No. .....

MAX OFFENBERG and MARIE OFFENBERG, husband and wife,

*Petitioners,*

*vs.*

THE STATE OF CALIFORNIA; THE COUNTY OF SAN BERNARDINO; G. LEON GREGORY, Tax Collector of the County of San Bernardino; ORVILLE K. DOYLE and LEONA M. DOYLE, husband and wife,

*Respondents.*

**Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two.**

Petitioners, Dr. and Mrs. Max Offenberg, respectfully pray for Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two, to review the judgment thereof holding that *notice* to a property owner (of the government's intention to sell his property for taxes) given according to statutory ritual (by directing the notice to a known incorrect address appearing on the assessment roll) constitutes adequate notice even when the government has knowledge of the property owner's correct address.

## Preliminary Statement.

This case is of profound importance in determining the scope of the government's power to divest a citizen of his title to property.

The issue in this case is whether a county, when conducting a proceeding which may result in the termination of a citizen's title to property, may disregard the constitutional prerequisites of due process by failing to give a known owner of the property adequate notice of its intended action.

The California Court of Appeal, Fourth Appellate District, Division Two, without addressing itself to this important constitutional question, merely affirmed the judgment of the lower court against petitioners. The written opinion of the court is unreported in the official California reports but is set out hereinafter in Appendix "A". The California Supreme Court denied a petition for hearing in this matter and remittitur issued on August 2, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Secs. 1257(3) and 2101.

**Grounds for Petition.**

The granting of this writ is necessary in order:

1. To settle important questions of constitutional law with respect to the giving of notice (of a tax sale) as a fundamental requirement of due process under the Fourteenth Amendment to the *United States Constitution;* and
2. To prevent a gross injustice from being perpetrated upon petitioners by having their property summarily taken from them without notice and, therefore, without due process of law.

**Question Presented for Review.**

Did the government illegally deprive petitioners of their property and deny them due process of law when it sold their property for delin-

quent taxes without first giving them adequate notice of its intended action and an opportunity to redeem the property prior to sale?

**Statement of Case.**

By this action, petitioners, Dr. and Mrs. Max Offenberg, seek to cancel a tax deed and to quiet title to a parcel of property located at Big Bear, California. The property is improved with a beautifully furnished mountain home which petitioners have owned since January of 1963.

At the time of the purchase of this property, as well as at all other times material hereto, the address of petitioners was 127 Utah Street, Los Angeles, California, the site of a hospital owned by them. It is at this address that petitioners have regularly and continuously received their mail for the past 25 years. Although petitioners sold the hospital in October, 1969, they continued to regularly receive their mail at that address through February, 1970, and even later.

Through an error on the part of the taxing officials of San Bernardino County (which error was perpetuated by the county over a period of seven years), petitioners never received a tax bill on the property and as a result thereof it was sold (again, without notice to petitioners) for delinquent taxes in January 1970. These omissions of notice occurred by reason of the fact that an incorrect address (that of the former owner of the property who lived in Arizona) was erroneously listed by the taxing officials on the county tax records as that of petitioners—even though the correct address of the petitioners was within their knowledge or readily available to them. Petitioners' true address was specifically noted on the grant deed which

conveyed the property to them and a copy of this deed was physically in the possession of the county taxing officials, as well as in the county recorder's office. At least two months prior to the sale, the tax collector examined the grant deed and noted petitioner's correct address thereon and transcribed the same to his records. The tax collector even highlighted petitioner's correct address on his records by using red ink in his transcription. The county also maintained an alphabetical listing of all property owners in the county together with their addresses and Mrs. Offenberg's name appeared on that list followed by her Los Angeles address.

For seven years, the tax collector sent the tax bills on the property to the erroneous address in Arizona and each of these bills was returned to his office unclaimed and retained in his file.

Petitioners were totally unaware of the county's error in transcribing an incorrect address on the assessment records in 1963 and the years thereafter and thus, were not in a position to call the error to the attention of the county officials. Moreover, in the course of his busy work as a physician, the doctor did not realize that he had not been receiving tax bills on this property. This is readily understandable since he never personally handled the payment of such bills, rather delegating that task to his auditor.* The doctor assumed, and reasonably so, that all tax bills on the property had been timely received and paid. No tax bill,

*Petitioners owned approximately 8 to 10 other parcels of property located in Los Angeles and San Bernardino Counties. Because of the exigencies of his profession as a physician, Dr. Offenberg employed an auditor to manage his business affairs relating to those properties and entrusted to him the duty of paying the taxes levied thereon.

however, was actually received by petitioners or their auditor either in 1963 or in any other year subsequent thereto. As a result thereof, the property became tax delinquent and was subsequently deeded to the State.

Approximately three weeks prior to the tax sale, the tax collector sent a notice of sale (which contained a defective description of the property to be sold) to petitioners, but it was directed to the incorrect address of the former owner in Arizona and as might be expected, this notice was promptly returned to the tax collector as undeliverable. Other attempts by the county to give notice to petitioners either proved ineffective or were jurisdictionally defective* and petitioners were *never* informed, formally or informally, that they could pay the back taxes and redeem their property or that it was to be sold for delinquent taxes. Published notice of the sale in the newspaper published at the county seat likewise proved defective because of an error in the description of the property to be sold.

Ten days prior to the sale, the assessment roll of the county was corrected to reflect petitioners' true address and the tax collector admitted that he was fully aware of this information. Nevertheless, he proceeded to sell the property without giving the statutory notice required by law.

Considering these circumstances, the State of California filed a disclaimer of any interest in the property adverse to the petitioners. The other respondents

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*The county claimed that two "courtesy" notices were mailed to petitioners at their correct address but the record is clear that no such notices were ever received by the petitioners. Neither the California Court of Appeal nor the respondents have contended that these notices met the constitutional and statutory requirements of notice.

(the County of San Bernardino and respondents Doyle, the purchasers at the tax sale), however, defended the action taken by the taxing officials and the Doyles filed a cross-complaint seeking to quiet title to the property in their name. At the trial of this case, the lower court sustained the tax deed, denied the relief sought by petitioners and entered judgment quieting title to the property in the names of respondents Doyle. The California Court of Appeal affirmed the judgment and the California Supreme Court denied a hearing.

## REASONS FOR GRANTING THE WRIT.

### I.

### THE FAILURE OF THE GOVERNMENT TO GIVE NOTICE OF TAX SALE DEPRIVED PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Notification is a fundamental requirement of due process and under the constitution, before the government has jurisdiction to conduct a tax sale, it must give notice of its intended action to the owner of the property to be sold. *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 70 S.Ct. 652, 657, 94 L.Ed. 865; *Schroeder v. City of New York* (1962) 371 U.S. 208, 83 S.Ct. 279, 282; *Dohrmann Co. v. Security Savings and Loan Assn.* (1970) 80 Cal.App.3d 664, 87 Cal.Rptr. 792; *Sinai v. Mull* (1947) 80 Cal.App.2d 277, 181 P.2d 924.

In *Lichfield v. County of Marin* (1955) 130 Cal. App.2d 806, 280 P.2d 117, the court held at page 121 that:

> "*The questions of notice and due process are so inextricably part and parcel of each other* that there could be no due process without the sovereign following some procedure which according to common experience should reasonably give notice of impending interference with ownership or right to possession." (Emphasis added).

and again on page 120, that:

> ". . . under the provisions of both the federal and state Constitutions property may not be taken from

the individual owner without due process of law. *In passing . . . statutes the state legislature cannot arise above this constitutional limitation.*" (Emphasis added).

In California, notice of a tax sale must be given both by publication and registered mail (Revenue and Taxation Code, Sections 3701 and 3702).* Both kinds of notice are equally essential to the validity of any tax sale. *Healton v. Morrison* (1912) 162 Cal. 668, 124 Pac. 240, 241.

In California, as elsewhere, the rule is firmly established that every essential step leading to the execution of a tax deed must be strictly followed or the deed executed pursuant thereto will be void. *Biaggi v. Phillips* (1942) 50 Cal.App.2d 92, 122 P.2d 619; *Numitor Gold Mining Co. v. Katzer* (1927) 83 Cal.App. 161, 256 Pac. 464; *Lewis v. Tulare Rec. Dist. 749* (1922) 56 Cal.App. 52, 204 Pac. 421; and *Holland v. Hotchkiss* (1912) 162 Cal. 366, 123 Pac. 258. As noted above:

> ". . . [I]t has become a fixed rule of property in California that in proceedings to sell property for unpaid taxes, no requirement of the statute can be disregarded, and that parties who purchase properties at tax sales acquire the title to the property purchased only if all the proceedings for the levy of taxes and the sale are in strict conformity to the requirements of the various statutes governing the same." *Biaggi v. Phillips* (1942) 50 Cal.App. 2d 92, 122 P.2d 612 at 624.

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*All sections referred to herein are found in the California Revenue and Taxation Code unless otherwise specially indicated.

**A. Notice to Petitioners at an Incorrect Address in Arizona Did Not Meet Either the Statutory Requirements of Notice or the Requirements of Due Process.**

Section 3701 provides in relevant part that:

> ". . . not less than 21 nor more than 28 days, before the proposed sale, the tax collector *shall* send notice by *registered mail* of the intended sale to the last assessee of . . . the property *at his last known address* . . ." (Emphasis added).

In other words, the statute requires that notice of sale must be given by the tax collector (1) not less than 21 nor more than 28 days before the proposed sale; (2) by registered mail; (3) to the last assessee of the property to be sold; and (4) at his last known address.

The requirement that the notice be sent by registered mail is to insure that the owner has *personal* notice of the intended sale of his property. *Numitor Gold Mining Co. v. Katzer* (1927) 83 Cal.App. 161, 256 Pac. 464, 466. In that case the court held that the purpose of such mailing of notice:

> ". . . is to afford *personal service* on the owner . . . and enable him to redeem the property . . . "Service of this notice by mail is also jurisdictional, and where it is returned prior to the sale without having been delivered, it is an insufficient service of notice, and a deed executed pursuant to such a defective notice is void." (Emphasis added).

In this case, the tax collector, approximately three weeks before the sale, mailed to petitioners at an erroneous address in Arizona a notice of intended sale of their property. This notice was sent by registered mail with a request for a return receipt and as might be

expected, it was promptly returned to the tax collector as undeliverable. Enclosed in the notice was a copy of the newspaper publication which contained an incorrect description of the property intended to be sold. The description published in the newspaper included not only the property intended to be sold but also a vacant parcel adjacent thereto which had been previously withdrawn from the sale by the tax collector.

This notice failed to comply with several of the substantive requirements of notice and thus was invalid. It was defective in the following particulars:

1. It was not sent to the petitioners at their "last known address."
2. It was never received by petitioners.
3. It contained an incorrect description of the property intended to be sold.

**1. Failure to Send Notice to Petitioners at Their "Last Known Address" Is Fatally Defective.**

Both Section 3701 and the standards of due process require that notice of intended sale be given to the owner at his "last known address." The "last known address" is the last or most current address of the delinquent taxpayer either *known* to or *ascertained* by the tax collector prior to the sale. *Smith v. Furlong* (1911) 160 Cal. 522, 117 Pac. 527; *Wright v. Anglo-Californian Bank* (1911) 161 Cal. 500, 119 Pac. 651; *Krotzer v. Douglas* (1912) 163 Cal. 49, 124 Pac. 722. The tax collector is not limited to an examination of the assessment roll to ascertain the last address of the property owner and the statute does not discourage additional efforts on his part to ascertain such information from other sources. Although technically the tax collector is under no obligation to look elsewhere to determine such

address, if he does ascertain it from other sources or if he has independent knowledge thereof (and such address is different from that appearing on the assessment roll) he is under a legal and moral obligation both under due process and the mandate of the statute to send the notice to the address which he knows or has ascertained to be the last address of the property owner. *Smith v. Furlong, supra; Wright v. Anglo-Californian Bank, supra; Krotzer v. Douglas, supra.*

In other words, once the tax collector has acertained the last address of the property owner, irrespective of the source of that information, he may not ignore or disregard that knowledge and rely solely on an address appearing on the assessment roll. To do so would not only violate the requirement of the statute that notice be sent to the "last known address" of the property owner, but more importantly it would defeat the specific purpose for which the notice provision was enacted, namely to provide the delinquent taxpayer with *personal notice* of the proposed sale of his property so that he might have a reasonable opportunity to redeem it. *Numitor Gold Mining Co. v. Katzer* (1927) 83 Cal. App. 161, 256 Pac. 264, 266.

In *Smith v. Furlong, supra,* the California Supreme Court recognized at page 528 that if "the tax collector had other information of a different address" from that which appeared on the assessment roll, he is required to send the notice of sale to such address. *Wright v. Anglo-Californian Bank, supra,* is to the same effect. In that case the bank was the party to whom the land was last assessed immediately prior to the tax sale. No notice was given to the bank. In challenging the sale and the tax deed issued thereunder, the bank contended

that "its address was then, is now, and for many years has been San Francisco, Cal." and further "that said address was well-known to said tax collector", and that therefore the tax collector's failure to give it notice rendered the sale void. The Court agreed and affirmed the judgment for the bank nullifying the sale.

In the *Krotzer* case, *supra*, the court held that where the tax collector, although not necessarily bound to do so, actually examines records other than the assessment roll to determine the last address of a property owner and as a result thereof ascertains such address, he is chargeable with that knowledge and must send the required notice to the address as ascertained by him. In emphasizing that the notice must be mailed to the "last known address" of the delinquent taxpayer, the court at page 723 stated that:

> ". . . a mailing to an address other than that designated by statute is no better than a want of any mailing . . ."

Common sense dictates that the notice must be sent to the last address of the delinquent taxpayer as ascertained by the tax collector. If the tax collector has such knowledge, he must then send the notice to the address either known to or ascertained by him from his investigation. Under either of these circumstances, any address appearing on the assessment roll which differs from his knowledge cannot legally or logically be classified as the "last known address" of the property owner and notice sent to such address is invalid as violative of due process.

Under the facts of this case, it is patently clear that the "last known address" of the petitioners as ascertained by the tax collector was their address in Los

Angeles—the address which appeared on the grant deed to the property, a copy of which was in the tax collector's file and which the tax collector reviewed and noted prior to the sale;—the address noted in red ink on the tax collector's records which were prepared by him for purposes of the sale;—the address listed for petitioners on the taxing officials' alphabetical listing of county property owners;—and the address reflected on the corrected 1969 assessment roll, which was physically in the tax collector's possession and of which he was admittedly aware.

The incorrect address appearing on the original assessment roll was inserted there solely through an error of the county taxing officials. Under the circumstances of this case, this address was not the last address of the petitioners known to the tax collector. This is especially true when you consider that over a period of seven years prior to the sale, the tax collector had actual knowledge that the Arizona address was not that of petitioners. In each year, his tax bill was sent to the Arizona address and returned to him and retained in his file. Moreover, it is conceded in this case that the tax collector had knowledge of petitioners' address in Los Angeles at least several months prior to the tax sale and that that address was different from that appearing on the assessment roll. Any lingering doubt about the inaccuracy of the Arizona address as that of petitioners was clearly dispelled when the notice sent to that address was promptly returned to the tax collector as undeliverable four days after it had been mailed. Likewise, any lingering doubt about the correctness of petitioners' Los Angeles address was clearly dispelled when ten days prior to the sale, the 1969 assessment roll was corrected by the assessor to reflect

the true address of the petitioneers. The Arizona address was lined out and petitioners' Los Angeles address was inserted in its place. When this correction was made, the assessment roll was physically in the possession of the tax collector and he conceded that he was immediately aware of the change. Under these circumstances, it is patently obvious that the "last known address" of the petitioners to the tax collector was their address in Los Angeles. Having ascertained that address as petitioners' last known address, it was incumbent upon the tax collector under due process and the statute to direct the notice of sale to petitioners at said address and by registered mail. It is conceded by the respondents that this was not done. The failure to give notice of the sale to the petitioners at their "last known address" renders the sale of their property and the tax deed issued thereunder void.

**2. Under Due Process Notice Sought to Be Served by Mail Is Ineffective Until It Is Received by the One Sought to Be Served.**

It is well settled that notice sought to be served by mail is not effective within the concepts of due process until it is received by the addressee. *Krotzer v. Douglas* (1912) 163 Cal. 49, 124 Pac. 722, 723; *Numitor Gold Mining Co. v. Katzer* (1927) 83 Cal.App. 161, 256 Pac. 464; *Benedict v. Andalman* (1970) 475 P.2d 953 (Ariz.); *Goodman v. Jones* (1967) 433 P.2d 980 (Ariz.); *General Factors, Inc. v. Beck* (1965) 409 P. 2d 40 (Ariz.)

The California Court of Appeal, however, did not address itself to this important constitutional concept. The court's failure to meet and discuss this issue is indeed one of the key factors justifying the granting of this petition.

In the *Krotzer* case, *supra*, the California Supreme Court declared at page 723 that:

> ". . . a mailing to an address other than that designated by the statute is no better than a want of any mailing, at least *where it appears, as it does here, that the notice did not in fact reach the person to whom it should have been sent.*" (Emphasis added.)

In *Numitor Gold Mining Co. v. Katzer, supra,* the court held at page 466 that:

> "The purpose of this mailing of notice is to afford *personal service* upon the owner . . . and enable him to redeem the property. . . .
>
> The service of this notice by mail is also jurisdictional, and, where it is returned prior to the sale *without having been delivered,* it is an insufficient service of notice, and a deed executed pursuant to such a defective notice is void." (Emphasis added.)

And in the recent tax case of *Benedict v. Andalman, supra,* decided less than two years ago, the court held at page 955 that:

> "A notice is a fundamental requirement of due process . . . *Notice sought to be served by mail is not effective until it is received by the one sought to be served.* (Numerous citations omitted)." (Emphasis added).

The notice sent to petitioners by registered mail at an incorrect address in Arizona was promptly returned to the tax collector as undeliverable and it was retained by him in his file to the date of trial. At no time did petitioners ever receive this notice. In view of this un-

contradicted fact, the conclusion is inescapable that this notice was totally ineffective as to petitioners and thus was insufficient to meet the requirements of due process.

The record also demonstrates that petitioner never received the so-called "courtesy" notices allegedly mailed to them at their correct address. Since due process and the statute contemplate "personal service" of notice upon the owner, failure to receive these notices renders them ineffective as to petitioners and any sale conducted pursuant to them is void.*

## II.

## NOTICE GIVEN ACCORDING TO STATUTORY RITUAL WILL NOT NECESSARILY MEET THE STANDARDS OF DUE PROCESS.

Assuming (without conceding) that the Court of Appeal's interpretation of Section 3701 is correct and that all the statute requires is the mailing of notice by registered mail to the owner *at the address appearing on the assessment roll*, irrespective of the tax collector's knowledge of the owner's true address as ascertained from other sources, then we respectfully submit that any such notice would of necessity be violative of due process under the circumstances of this case, first because it would not be calculated to convey to the owner the information contained in the notice and second, it would violate the purpose for which the notice provision was enacted, to wit: to afford the delinquent taxpayer *personal notice* of the tax sale so that he might have a reasonable opportunity to redeem his property. *Numitor Gold Mining Co. v. Katzer* (1927) 83 Cal.

*Neither the California Court of Appeal nor the respondents have contended that these notices met the constitutional and statutory requirements of notice.

App. 161, 256 Pac. 464, 466. This is particularly true in this case where the tax collector had knowledge of petitioners' correct address prior to the sale and knew that the address on the assessment roll was incorrect. Under these circumstances, the mailing of the notice to the petitioners at the incorrect address appearing on the assessment roll constituted a mere gesture, and was not notice reasonably calculated to apprise the petitioners of the information contained therein. It thus constituted inadequate notice under the concept of due process.

The leading case on adequacy of notice is *Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, which held that strict compliance with statutory notice procedures does not necessarily satisfy due process. This court held that before a person can be finally deprived of property rights, there must be notice given "reasonably calculated, under all the circumstances, to apprise interested parties" of the pendency of the proceedings.

The case involved notice by publication to the beneficiaries of a common trust fund. This Court held the notice sufficient as to *unknown* beneficiaries, but as to beneficiaries whose existence and whose whereabouts were known, the published notice violated due process.

The court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citations omitted). The notice must be of such

nature as reasonably to convey the required information. . . .

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (at p. 657.)

The notice mailed to petitioners at the address appearing on the assessment roll was totally inadequate in this case because it was not reasonably calculated to reach the petitioners. This is particularly true where as here the tax collector had ascertained the correct address of the petitioners. Any notice directed to a known incorrect address, such as the one that appeared on the assessment roll, constitutes a mere gesture and is not due process.

In 1956, the U.S. Supreme Court reaffirmed the *Mullane* doctrine in *Walker v. City of Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178, and pointed out that the notice required to satisfy due process "will vary with circumstances and conditions." The *Walker* case involved a condemnation proceeding and notice of proceedings to determine plaintiff land owner's compensation was given by publication as authorized by the statute then in force. This Court held that the newspaper publication was not adequate to satisfy due process where the land owner's name and address were *known* to the condemning entity. The court relied on its decision in *Mullane* and said:

"That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We

there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give notice, for example, where people are missing or unknown.

"Measured by the principle stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landlord of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of *personal notice* to interested parties. In the present case there seems to be no compelling or even persuasive reasons why such *direct notice* cannot be given." (Emphasis added.)

In the case at bar, there is no compelling or even persuasive reason why direct notice by registered mail could not have been given to petitioners of the impending sale of their property at their correct address which was known to the tax collector. The ritualistic mailing of notice to a known incorrect address appearing on the assessment roll is no substitute for "direct notice", especially where petitioners' true address was known to the tax collector.

The applicability of the *Mullane* doctrine to tax proceedings was upheld in *Schroeder v. City of New York* (1962) 371 U.S. 208, 83 S.Ct. 279; *Dohrmann Co. v. Security Savings and Loan Assn.* (1970) 80 Cal. App.3d 664, 87 Cal.Rptr. 792; and *Meadowbrook*

*Manor, Inc. v. City of St. Louis Park*, 104 N.W.2d 540 (Minn.).

In the *Schroeder* case, *supra*, this Court held that:

". . . [T]he requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard. 'This right . . . has little reality or worth unless one is informed that the matter is pending and can chose for himself whether to appear or default, acquiesce or contest.' 339 U.S., at 314, 70 S.Ct., at 675." (at p. 282.)

In the recent California case of *Dohrmann Co. v. Security Savings and Loan Assn., supra*, the court in discussing the adequacy of notice of a tax sale by posting in three public places as provided by statute, stated:

"When conducting a proceeding which may result in the termination of a citizen's title to property, government denies due process of law to a known, interested party if it fails to give him adequate notice of its action. (numerous citations omitted) *Notice given according to statutory ritual will not necessarily meet due process standards:* '[t]he means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' (Mullane v. Central Hanover Tr. Co., *supra*, 339 U.S. at p. 315, 70 S.Ct. at p. 657.) As to known persons with known addresses, '[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties.'" (Emphasis added.)

See also *Allen v. Flournoy* (1972) .... Cal.App.3d ...., 103 Cal.Rptr. 275.

Under the *Mullane* and *Dohrmann* doctrines, due process was denied petitioners by the very fact that the tax collector, with knowledge of their correct address, which address was different from that contained on the assessment roll, chose to follow the alleged statutory, but ineffectual and ritualistic practice of sending the registered notice to the known incorrect address appearing on the assessment roll. If the purpose of his action in doing so was to sell the property at a bargain price and thereby punish a delinquent property owner, such a course of conduct may be defensible. But if the purpose of the notice is to apprise the owner of the sale and to compel the payment of taxes, then his action is indefensible.

For reasons unknown to petitioners, the California Court of Appeal did not address itself to the constitutional principle enunciated by the authorities discussed above. The failure of the court to meet and discuss this important constitutional doctrine necessitates the granting of this petition.

**Conclusion.**

Notification is a fundamental requirement of due process. The failure of the government in this case to give petitioners adequate notice of the tax sale deprived them of their property without due process of law.

The purpose of notice in these cases is to apprise the owner of the pendency of the sale and afford him an opportunity to redeem his property. In the case at bar, this purpose was completely frustrated, as petitioners were never informed, formally or informally, that they could pay the back taxes and redeem their

property or that it would be sold for delinquent taxes. It would appear that the respondents in this case desire to perpetuate this frustration of purpose rather than to take steps to correct it. Only the State of California had the courage to recognize the gross injustice of what had occurred and true to its convictions it filed a disclaimer in favor of petitioners.

The decision of the California Court of Appeal fails to discuss the important due process considerations involved in this case. By failing to respond to these constitutional considerations, it has in essence sanctioned the taking of petitioners' property without due process of law. The granting of this petition is necessary to prevent this unjust result.

Because this matter is one of equity, petitioners have offered and continue to offer to pay to the parties legally entitled thereto all delinquent taxes, penalties, interest and other costs provided by law for the redemption of the subject property in conformance with the provisions of the California Revenue and Taxation Code.

For the reasons above stated, it is respectfully submitted that this Court grant the petition and reverse the judgment of the court below.

Respectfully submitted,

MIKE MAYO,
MESSRS. SIMON, SHERIDAN, MURPHY,
THORNTON & MEDVENE,
By JOHN D. CAHILL,
*Attorneys for Petitioners.*

## APPENDIX A.

### Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Second Division, State of California.

Max Offenberg and Marie Offenberg, Plaintiffs and Appellants, v. The State of California, et al., Defendants and Respondents. 4 Civil 11634, (Sup. Ct. No. 150618).

Filed: May 31, 1972.

APPEAL from a judgment of the Superior Court of San Bernardino County. Vernon W. Hunt, Sr., Judge.* Judgment affirmed.

Simon, Sheridan, Murphy, Thornton & Medvene, John D. Cahill and Mike Mayo, for Plaintiffs and Appellants.

Stanford D. Herlick, County Counsel, and Robert W. Walker, Deputy County Counsel, for Defendants and Respondents County of San Bernardino and G. Leon Gregory, Tax Collector.

Fullerton & Morris and Robert S. Morris, for Defendants and Respondents Orville K. Doyle and Leona M. Doyle.

BY THE COURT

Appellants, plaintiffs below, are Dr. Max Offenberg and his wife Marie.

During January 1963 appellants purchased real property at Big Bear in San Bernardino County. The property was assessed for real property taxes as two separate adjoining parcels. The parcel that concerns us here is a 100 by 165 foot lot improved by construction of a

*Retired judge assigned by the Chairman of the Judicial Council.

substantial mountain cabin. The second parcel was unimproved.

A real property tax was levied on the Big Bear property, attaching as a lien as of noon on the first Monday in March 1963 (Rev. & Tax. Code, § 2192). The tax on the mountain cabin parcel was never paid. On June 30, 1964, the property was sold to the state (Rev. & Tax. Code, § 3436). On July 3, 1969, the tax collector executed a deed conveying the property to the state (Rev. & Tax. Code, § 3511). The tax collector gave notice of intended sale of tax-deeded property pursuant to section 3701 of the Revenue and Taxation Code, which reads as follows:

> "After receiving the written authorization of the Controller and not less than 21 nor more than 28 days, before the proposed sale, the tax collector shall send a notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. To ascertain the address of the last assessee of the tax-deeded property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll."

Notice of intended sale was published in the county seat and in the judicial district in which the property is situated (Rev. & Tax. Code, §§ 3702, 3704). On January 20, 1970, the mountain cabin parcel was sold at public auction to Orville and Leona Doyle, the highest bidders (Rev. & Tax. Code, § 3706). On receiving the full purchase price the tax collector executed a deed to the purchasers (Rev. & Tax. Code, § 3708). The unimproved parcel adjoining the mountain cabin parcel

was not sold at the public auction, having been earlier withdrawn from sale for reasons discussed below.

Respondents Doyle wrote appellants that they had taken possession of the cabin and requested appellants to remove their personal property therefrom. This lawsuit followed.

On February 16, 1970, appellants filed a "Complaint to cancel tax deed; quiet title; forcible entry; and conversion," naming as defendants the State of California, the County of San Bernardino, the county tax collector, and the Doyles. The state filed a disclaimer. The county and the tax collector answered. The Doyles answered and cross-complained to quiet their title against the appellants. The matter was tried to the court. Findings of fact and conclusions of law were made and judgment was given that appellants take nothing by their complaint and that title to the property be quieted in the Doyles, from which judgment this appeal is taken.

It appeared at the trial that the 1963 tax bill and all subsequent bills were sent to appellants at a Yuma, Arizona address. This address appears in the record as the address of the person from whom appellant purchased the property and is likewise the address given for the assessees of the mountain cabin parcel appearing on each assessment roll from 1963 onward. The original deed to appellants included an instruction in the upper lefthand corner that after recording, the deed should be mailed to "Mr. and Mrs. Max Offenberg, 127 Utah Street, Los Angeles, California." As part of the routine preliminaries to the public auction, the tax collector prepared a "tax sale search sheet" which noted the Los Angeles address. At the same time the tax collector sent the notice of intended sale to the Yuma

address by registered mail, he sent a "courtesy notice" to the Los Angeles address by regular mail.

The Los Angeles address was the location of a hospital formerly owned by Dr. Offenberg. Dr. Offenberg had sold the hospital in October 1969, at which time he requested the post office to forward any mail. The notice sent to Los Angeles never reached appellants. The notice sent to Yuma was returned marked "Moved —left no address."

It also appeared at the trial that appellants were knowledgeable in real estate matters, as evidenced by their ownership of approximately eight parcels of real property in Los Angeles County and other real property at Hesperia in San Bernardino County. Mrs. Offenberg testified that she did not receive a tax bill for 1963 or any subsequent year on the Big Bear property. She was aware of the necessity of keeping the tax authorities advised of a current address since during December 1969, in respect to the Hesperia property only, she notified the San Bernardino County Tax Assessor to discontinue sending the tax bills to the Los Angeles address and to send them to a Montebello residence address. Although Dr. Offenberg testified that he relied on his auditors to "take care of all the taxes and so forth," the record permits the inference that appellants failed to pay the taxes because they believed that the property had escaped assessment.

To begin, the deed to the state transfers title to the state the same in effect as a voluntary grant (*Sears v. County of Calaveras*, 45 Cal.2d 518, 522), leaving the former owner with a statutory right of redemption only (Rev. & Tax. Code, § 4101). On completion of the sale after the deed to the state, the right of redemp-

tion is terminated (Rev. & Tax. Code, § 3707). There is no constitutional right of redemption, which comes entirely from the statute and is subject to all the limitations and conditions therein imposed (*Peterson v. Johnson*, 39 Cal.2d 745, 748). The Legislature might have adopted a scheme of disposing of tax-deeded property without notice given to the delinquent taxpayer of intention to do so (*Smith v. Furlong*, 160 Cal. 522, 529). As it is the statute does require notice both by mail and by publication. There was substantial evidence that the requirements of the statute concerning notice were fully complied with.

The trial court found against appellants on the allegation that when the tax collector noted the Los Angeles address he "discovered the true address" of the appellants, and was accordingly obliged to give notice to appellants to the Los Angeles address by registered mail.

According to the evidence, the tax collector processed the sale routinely, and did not know whether the Los Angeles address was a correct address or not. This fact could have been determined only by further investigation, which duty the Legislature has not imposed upon the tax collector. The "courtesy notice" was nothing more than the name implies, that is, a voluntary extra effort on the part of the tax collector for the benefit of the delinquent taxpayer. The statutory scheme places the burden on the tax collector to ascertain the address of the last assessee of the tax-deeded property sought to be sold by "an examination . . . made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll." (Rev. & Tax. Code, § 3701). The assessment of the mountain cabin

parcel on the 1963-1969 rolls placed in evidence gives the Yuma address for appellants. Notice given to the Yuma address by registered mail constituted full compliance with the law.

Also concerning the notice by mail, appellants placed in evidence the 1969 assessment roll entry for the unimproved parcel adjoining the mountain cabin parcel which was listed separately in the rolls from the mountain cabin parcel. As to this entry, a handwritten notation was made by someone in the tax assessor's office on January 10, 1970, ten days before the date set for the tax sale of the mountain cabin parcel, lining through the Yuma address and setting out the Los Angeles address. This moved the tax collector to send a second notice by regular mail to the Los Angeles address. The following explanation was given: "We make every effort to notify the taxpayer, and if one attempt fails, we'll make a second try. [¶] When I found the additional assessee's lot, I sent the second letter." Appellants contend that upon observing the notation of the Los Angeles address on the assessment roll entry for the unimproved parcel, the tax collector should have withdrawn the mountain cabin parcel from sale. Nothing in the Revenue and Taxation Code would compel this result. The notation did not constitute any better evidence than the tax collector already had on hand for purposes of the mailed notice relating to the mountain cabin parcel, which was given in the manner already set forth.

Appellant argues that the published notice was defective. No issue was raised by the pleadings in this regard. Nevertheless the record has been examined and it reveals that the mountain cabin parcel was correctly

described in all notices given. The unimproved parcel was not included in the notice published in the judicial district in which the property is situated, and this is the apparent reason why it was withdrawn from sale. Using appellants' own cited standard, "the object of the statute is to notify the owner that the taxes thereon are delinquent . . . and the description of the lot must be sufficient to give such notice." The purpose of the statutory notice concerning the mountain cabin parcel was thus achieved.

Since the Doyles have good title to the property, the issues concerning forcible entry and unlawful detainer drop out of the case. As far as the question of conversion is concerned, there was substantial evidence that the Doyles asserted no ownership of appellants' personal property found in the cabin; there was no evidence that the Doyles exercised any wrongful dominion over such property. Any incidental use of appellants' property was attributable to the fact that appellants failed to honor the request to remove the same.

The judgment is affirmed.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 26 1972

DEAR SIR: *I have this day filed Order*

WARREN BISHEL

*In re:* 4 Civ. No. 11634

Offenberg

*vs.*

State of California
Co. of San Bernardino

*Respectfully,*

G. E. BISHEL
*Clerk*

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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

October Term, 1972

No. 72-659

MAX OFFENBERG and MARIE OFFENBERG, husband and wife,

*Petitioners,*

- vs -

THE STATE OF CALIFORNIA, THE COUNTY OF SAN BERNARDINO, G. LEON GREGORY, Tax Collector of the County of San Bernardino, ORVILLE K. DOYLE and LEONA M. DOYLE, husband and wife,

*Respondents.*

## RESPONSE OF RESPONDENTS DOYLE TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

### STATEMENT OF FACTS

This petition was filed late and should therefore be denied (Point I). The petition does not present the facts in the case with accuracy and does not cite the record in support of purported factual statements.

What is presented is a highly argumentative and biased statement disregarding totally the findings of the trial court, findings which were found to be supported by substantial evidence in the opinion of the California Court of Appeal below. Respondents Doyle urge in Point II that because of the violation of Rule 23 by the petitioners this petition should be denied. In the event, however, the Court does not see fit to deny the petition under the grounds stated in Points I or II, and the facts of the case therefore become material to the Court's determination, the Respondents Doyle do present herewith a statement of facts which they believe to be accurate and which contains appropriate references to the record.

---

Petitioners' verified complaint, filed on February 16, 1970, alleged that plaintiffs had "for a long time" been the owners of the subject property (a lot improved by a cabin at Big Bear Lake, California); that the property was sold to the State of California on June 30, 1964, for unpaid property taxes for the fiscal year 1963-1964; that on January 20, 1970, the property was conveyed by tax deed to the Defendants Doyle. [Clk. p.2, l.8-27.]

The complaint further alleged that since January 22, 1963, the assessment roll showed the address of plaintiffs as 127 Utah Street, Los Angeles; that "said address was and now is a correct mailing address for plaintiffs." [Clk. p.2, l.29-32.] California Revenue and Tax Code Section 3701 was quoted verbatim as follows:

> "After receiving the written authorization of the Controller and not less than twenty-one nor more than twenty-eight days, before the proposed sale, the tax collector shall send a notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. To ascertain the address of the last assessee of the tax-deed property, an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll."

The complaint alleged that the tax deed was invalid for failure of the tax collector to send notice of proposed sale as required by Section 3701 to the plaintiffs; that the tax collector rather mailed notice to plaintiffs at an address in Yuma, Arizona; that, upon the return of that notice by the post office, the tax collector examined the assessment roll, discovered the true address of the plaintiffs, but, nonetheless, failed to give the required statutory notice. [Clk. p.3, l.1 to p.4, I.2.]

The defendant State of California filed a disclaimer [Clk. pp.28-29.] (Petitioners contend here the State acted to rectify a gross injustice to them. To say the least, this contention finds no support in the record.) The answer of the County of San Bernardino denied that the assessment roll for any year since 1963 for the subject property ever showed the address of 127 Utah Street, Los Angeles, California; it alleged compliance with Section 3701 and set forth the affirmative defense of estoppel against the plaintiffs for failing to take any steps to discover why they did not receive tax statements on the property, for failing to notify the

assessor as to their correct mailing address, and for failure to take reasonable steps to ascertain and pay their property taxes from January 22, 1963, through the date of the tax sale, January 20, 1970. [Clk. pp. 8-12.]

The matter was tried without a jury. The evidence showed that petitioners purchased the subject property, from a Henry Rampy of Yuma, Arizona, on January 23, 1963, through an escrow at The Bank of California in Big Bear, California. [Ex.B-D, C-D.] The escrow instructions provided for proration of the real property taxes [Ex. B-D], and the taxes for the fiscal year 1962-1963 were prorated by the escrow holder according to the closing escrow statement furnished to the petitioners [Ex. C-D]. Plaintiffs Offenberg informed their auditor of this transaction by furnishing him with the escrow instructions and the closing statement showing the prorated real property tax payment. [R. p.143, l.8-22.] Their payment of the buyers' prorata share of taxes for the fiscal year 1962-1963 was the last payment of taxes made by the Offenbergs on this property. [R. p.129, l.8-12.]The Offenbergs owned a dozen other parcels of real property on which they paid taxes. [R. p.119, l.15-28.]

The assessment rolls for the years 1963 through 1969 were prepared by the San Bernardino County tax assessor's office and then delivered to the tax collector's office. [Ex. 2, R. p.5, l.10-24.] The tax collector prepared tax statements from the assessment roll and then mailed them to the last assessee at the address shown on the assessment roll. [R. p.5, l.10 to p.6, l.1.]

Tax statements on this property were mailed to the Offenbergs at 2540 Fourth Avenue, Yuma, Arizona [R. p.5, l.10-26], an address which the escrow instructions showed as the address for the seller [Ex. 1, B-D]. There was no evidence as to whether the statements so addressed were returned to the tax assessor's office. [R. p.6, l.2 to p.7, l.18.]

Petitioners for seven years never received any tax statements. [R. p.128, l.15-18.] The Offenbergs never inquired of the tax assessor's or the tax collector's office why they were not receiving tax bills. [R. p.129, l.25 to p.130, l.4.] Dr. Offenberg inferred from the nonreceipt of tax statements that this property had escaped assessment. He testified [R. p.129, l.5-12]:

> "Q Did you ever ask the owners around you whether they got assessed for their property?
>
> "A I know they got assessed. I know I was going to get assessed also.
>
> "Q When did you think it was going to happen, sir?
>
> "A I didn't know about that. We didn't receive any notice. I didn't pay it. That is what it amounts to."

Mrs. Offenberg likewise believed their property had escaped assessment. On the day she learned of the tax sale, she went to talk to the respondent purchasers at the property in Big Bear, and her first statement to them was, "I have never been assessed and never re-

ceived a tax bill." [R. p.207, l.15 to p.208, l.1.] On cross-examination, after admitting to the making of this statement, Mrs. Offenberg reiterated, "I didn't receive a tax bill. I did not receive a tax bill." [R. p.137, l.16-23.]

Early in the trial, plaintiffs' attorney represented to the Court that ". . . even to this date their address is 127 South Utah, Los Angeles, California." [R. p.34, l.10-12]. On direct examination, Dr. Offenberg was asked whether this was his address and whether he regularly received mail at that address through January of 1970. He replied in the affirmative. [R. p.111, l.5-9.]

But on cross-examination, the doctor admitted that he had sold the hospital in October, 1969. [R. p.115, l.2-4]. He stated that he continued to receive mail addressed to him there after the sale, but it was mail that was forwarded to him by the post office pursuant to the change of address he had filed with the post office. [R. p.115, l.15-24.] Mrs. Offenberg admitted that on the day she learned of the tax sale she stated that, "I'm not even sure I get half of my mail there since we sold the hospital." [R. p.137, l.16-19.]

Mrs. Offenberg admitted she had owned another parcel of real property in San Bernardino County for over five years before the tax sale. [R. p.134, l.21 to p.135, l.21.] She received tax bills on that property, and she paid them. [R. p.134, l.14-24.] She admitted that on December 8, 1969, after the sale of the hospital in October, but before the mailing of notice of the tax sale on the subject property, she filled out and filed

with the San Bernardino County Tax Assessor a form reflecting a change of mailing address for tax statements for her Hesperia property from 127 Utah Street, Los Angeles, to her residence at 1107 West Beverly Boulevard, Montebello. [R. p.136, l.3-13; p.116, l.23 to p.117, l.7; Ex. A-D.]

The subject property was sold to the State on June 3, 1963. [Ex. 2, R. p.9, l.7-11.] It was deeded to the State on July 3, 1969 [Ex. 2], and was scheduled for sale by public auction on January 20, 1970 [R. p.100, l.12 to p.101, l.19]. Notice of sale was made by registered letter addressed to the Offenbergs at 2540 Fourth Avenue, Yuma, Arizona; it was mailed on December 29, 1969, and was returned to the tax collector on January 2, 1970, with the notation, "Moved — Left no Address." [R. p.15, l.13 to p.16, l.5, Ex. 3.] Notice of the sale was published in newspapers at the county seat and in the judicial district where the property was located on December 29, 1969. [R. p.106, l.2 to p. 107, l.12; Ex. 8 and 9.]

The deputy tax collector testified that in preparation for the tax sale, a tax search sheet was typed sometime after July of 1969. [Ex. A; R. p.72, l.1-4.] A check was made to search for any changes of ownership and other information to assist in identifying the assessee, including the finding of any other addresses for the assessee and addresses of adjoining owners. [R. p.76, l.1-8.] In this process, the recorded deed under which the Offenbergs acquired title was examined and, as a result, the address of 127 Utah Street, Los Angeles, was noted on the tax search sheet in November, 1969. [R. p.61, l.3-13; p.73, l.14-26; p.82,

l-114; Ex. 1.] On December 29, 1969, on the same date the tax collector sent a registered-mail notice to the address shown on the assessment roll, namely, 2540 Fourth Avenue, Yuma, Arizona, he also mailed the same notice by regular mail to Max Offenberg at 127 Utah Street, Los Angeles [Ex. B and 3; R. p.92, l-8-13; p.83, l.26 to p.84, l.17], and to three adjoining property owners [R. p.93, l.11 to p.95, l.12; Ex. B and C].

On or about January 10, 1970, the deputy tax collector noted on the assessment roll for a vacant adjoining parcel of the Offenbergs, which was withdrawn from sale because of an error in description, a notation placed there by the assessor's office showing a substitute address of 127 Utah Street, Los Angeles. [Ex. 6; R. p.102, l.1-23.] On January 10, 1970, the deputy tax collector sent a second notice of sale by regular mail to the Offenbergs at that address. [R. p.101, l.20 to p.104, l.8.] The tax sale was made on January 20, 1970, to the respondents Doyle. [Clk. p.2, l.8-27; Ex. 11.]

The trial court found that on December 29, 1969, and within the time provided by Section 3701 of the Revenue and Taxation Code, the tax collector sent a registered-mail notice of the intended sale to the last assessee of the subject property, namely, the plaintiffs, at the address of the assessee as reflected by the assessment rolls beginning with the year of delinquency, to and including that of the last equalized roll, and that said address was 2540 Fourth Avenue, Yuma, Arizona. [Clk. p.57, l.7-15.] The Court further found that

a copy of the notice was also mailed on December 29, 1969, by regular mail to the plaintiffs at 127 Utah Street, Los Angeles, California, and that the tax collector on January 10, 1970, again mailed a copy of the notice by regular mail to the plaintiffs at that address. [Clk. p.57, l.17-22.]

The trial court found that the plaintiffs were estopped to question the validity of the deed for their failure to take any steps to discover why they were not receiving tax statements, for their failure to notify the assessor of their correct mailing address, for their failure to make reasonable efforts to ascertain the taxes due on the property from the time they acquired the property through January 20, 1970, and for their failure to pay any taxes on the property during the said period while they were record owners thereof. [Clk. p.58, l.7-11.]

## I

## THE PETITION WAS NOT FILED WITHIN THE PRESCRIBED TIME AND SHOULD BE DENIED.

A writ of certiorari for the purpose of bringing a judgment of a state court before the United States Supreme Court for review is required to be applied for within ninety days after the entry of the judgment. 28 U.S.C. Section 2101(c). The judgment of the Appellate Court which is sought to be reviewed here was entered on May 31, 1972. See photocopy of Court of Appeal opinion appended hereto as Appendix "A" bearing the filing stamp of the clerk of the Court of Appeal. The test of finality for purposes of review of a final judgment of a state appellate court is the rendition of a final appellate decision on the issues, that is

to say, the date of the filing of the opinion. As this Court stated in *Market St. Ry. Co. v. R. R. Com.* (1945) 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment . . . such latent powers of State Courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run." [324 U.S. at 551-552.]

The petitioners here did apply to the California Supreme Court for a hearing which was denied on July 26, 1972. See photocopy of denial appended hereto as Appendix "B." Even if the date on which the hearing was denied in the California Supreme Court were taken as the date of final judgment for the purpose of starting the running of the ninety-day period, the petition was required to be filed on October 24, 1972, and, in fact, was not filed until October 28, 1972. No extension of the ninety-day period was obtained, and, thus, this Court lost certiorari jurisdiction four days before the petition was filed.

## II

## THE PETITION SHOULD BE DENIED BECAUSE OF PETITIONERS' MISSTATEMENT OF THE FACTS.

Petitioners state that the California Court of Appeal upheld as adequate a notice of sale of real property directed to a "known incorrect address" where the

government "knew" the property owner's correct address; and that this presents a question whether such procedure is consonant with due process of law, a question which they say was not dealt with by the Court of Appeal.

But this due process issue here as before the California Court of Appeal is simply a fabrication founded upon misstatement of facts.

The petitioners alleged in their verified complaint that 127 Utah Street, Los Angeles, was their correct mailing address at the time of the mailing of the statutory registered mail notice on December 29, 1970. [Clk. p.2, l.31-32.] This assertion was reiterated by plaintiffs' counsel at an early stage of the trial when he represented to the trial court that "[a]t all times . . . *even to this date*, their address is 127 South Utah, Los Angeles, California." [R. p.34, l.9-12; italics added.] Dr. Offenberg testified on direct examination that he regularly received his mail at that address through January, 1970. [R. p.111, l.5-9.]

But, on cross-examination, Dr. Offenberg admitted that he sold the hospital in October, 1969. [R. p.115, l.2-4.] He then volunteered that he "still received mail from there," not, however, mail forwarded on by the buyers, but by the post office pursuant to a change-of-address form which he filed with the post office. [R. p.115, l.8-24.] Mrs. Offenberg admitted that on the day she learned about the tax sale she stated to the Doyles: "I'm not even sure I get half my mail there since we sold the hospital." [R. p.137, l.16-19.] She further admitted that on December 8, 1969, in respect

to another parcel of property in San Bernardino County standing in her name, she notified the county tax assessor to discontinue sending her tax bills to 127 Utah Street, Los Angeles, and to send them to a new address in Montebello. [R. p.136, l.3-13; Ex. A-D.]

Simultaneously with the sending of the registered mail notice to the address in Arizona on December 29, 1969, the tax collector mailed an identical notice to the petitioners by regular mail to the 127 Utah Street, Los Angeles, address. Again, on January 10, 1970, the tax collector mailed such "courtesy" notice to the petitioners at their 127 Utah Street address. [R. p.129, l.5-12; Clk. p.57, l.17-22.] Petitioners did not receive these notices so mailed to them. [R. p.102, l.5-15, p.109, l.14-20.]

The trial court *found* that 127 Utah Street, Los Angeles, was not, as alleged, a correct mailing address of the petitioners, and it therefore found also against the contention that when the tax collector noted the Los Angeles address he "discovered the true address" of the petitioners and was therefore obliged to give them a registered mail notice to that address. [Clk. p.3, l.1 to p.4, l.2.] The Court of Appeal made reference to and relied on these factual findings. [Op.Ct. App. p.5.]

In the face of these very adequately supported findings, petitioners still contend and premise their argument here on the contention that "they continued to regularly receive their mail at that address through February, 1970, and even later." [Pts.Br. p.3.]

The contention that the "government" *knew* the "property owner's correct address" at the time of the mailing of the statutory registered mail notice is patently incorrect since 127 Utah Street was no longer the taxpayers' address and two regular mail notices of the sale to that address failed to reach petitioners. [R. p.102, l.5-15, p.109, l.14-20.] The Court of Appeal disposed of this same contention as follows:

> "According to the evidence, the tax collector processed the sale routinely, and did not know whether the Los Angeles address was a correct address or not. This fact could have been determined only by further investigation, which duty the legislature has not imposed upon the tax collector." [Appendix "A," Page vi.]

Another contention of the petitioners made and found wanting by the Court of Appeal and reiterated here is that the petitioning doctor, "in the course of his busy work," and the doctor's wife, whose distraction is not stated, did not realize they had not been receiving tax statements and reasonably assumed they were all received and paid. On this point, the Court of Appeal stated:

> "Although Dr. Offenberg testified that he relied on his auditors to 'take care of all the taxes and so forth,' the record permits the inference that appellants failed to pay the taxes because they believed that the property had escaped assessment." [Appendix "A," p. v.]

Note the testimony of Dr. Offenberg:

"Q Did you ever ask the owners around you whether they got assessed for their property?

"A I know they got assessed. I know I was going to get assessed also.

"Q When did you think it was going to happen, sir?

"A I didn't know about that. We didn't receive any notice. I didn't pay it. That is what it amounts to."
[R. p.129, l.5-12.]

Mrs. Offenberg admitted on the day she learned of the tax sale she told the respondent purchasers:

"I have never been assessed, and I never received a tax bill." [R. p.207, l.15 to p.208, l.1.]

And when confronted with this admission on cross-examination, she reiterated:

"I didn't receive a tax bill. I did not receive a tax bill." [R. p.137, l.16-23.]

From this evidence, it is apparent that the petitioners were in fact well aware of their failure to receive tax statements on this property and that they inferred from such non-receipt of tax bills that their property had escaped assessment, just as the Court of Appeal pointed out in its opinion. [Appendix "A," p. v.]

Petitioners have violated Rule 23 by presenting here

a highly biased, inaccurate statement of facts. Their petition should be denied for this violation.

## III

## NOTICE TO PETITIONERS WAS IN CONFORMITY WITH THE CALIFORNIA STATUTORY REQUIREMENT.

The trial court found that the tax collector gave the notice by mail and by publication which was required under the applicable statute, Revenue and Taxation Code Section 3701. [Clk. p.57, l.7-15.] The Court of Appeal concluded that:

> "There was substantial evidence that the requirements of the statute concerning notice were fully complied with."

The contention of petitioners that the statute was not complied with represents, obviously, a collateral attack on this finding and seeks to involve this Court in reweighing the evidence.

Section 3701 requires the tax collector to send a notice by registered mail "to the last assessee . . . at his last known address." The section then spells out precisely what efforts the tax collector is required to make in order to ascertain this "last known address":

> "To ascertain the address of the last assessee of the tax-deeded property, an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll."

The California decisions interpreting Section 3701 and its statutory predecessors show beyond question that the tax collector is required to do nothing more in ascertaining the "last known address" of the taxpayer than the section literally requires. *Crouch v. Shafer* (1917) 177 Cal. 154, 169 Pac. 1010 (Assessment roll showed street address but not city of residence. Held, tax collector was not required to mail any notice and the tax deed from the State was sufficient to vest title in the purchaser at the tax sale), *Penaat v. Terwilliger* (1944) 23 Cal.2d 865, 147 Pac.2d 552 (Taxpayer's name but no address appeared on the assessment roll. Held, no mailing of notice was required to impart validity to the tax sale).

The rationale of these decisions is, as the Court of Appeal pointed out in its opinion, that the deed to the State transfers title to the State in the same manner as a voluntary grant leaving the former owner with a statutory right of redemption only [Rev. and Tax. Code, Section 4101; *Sears v. County of Calaveras* (1955) 45 Cal.2d 518, 522, 289 P.2d 425]; that thereafter there is no constitutional right of redemption, which comes entirely from the statute and is subject to all the limitations and conditions imposed thereby [*Peterson v. Johnson* (1952) 39 Cal.2d 745, 748, 249 P.2d 17]; that the Legislature had the power to dispense with further notice to the delinquent taxpayer after the deed to the State [*Smith v. Furlong* (1911) 160 Cal. 522, 117 Pac. 527].

## IV

## THE STATUTORY NOTICE GIVEN TO PETITIONERS UNDER THE CIRCUMSTANCES OF THIS CASE DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

*Mullane v. Central Hanover Bank* (1950) 339 U.S. 306, 70 S.Ct. 652, 984 L.Ed. 865, cited by petitioners, points out that what is constitutionally required by way of notice depends upon "all the circumstances." *Dohrmann Co. v. Security Savings & Loan Assn.* (1970) 8 Cal.App.3d 655, 87 Cal.Rptr. 792, from which petitioners also quote, posed the question whether a declaratory relief complaint brought by a conditional seller of personal property stated a cause of action in challenging the validity of a tax sale of personal property where the seller was ignorant of the sale and the only notice given was by posting in three public places. The Court observed that this was a lesser notice than that given by newspaper publication in *Mullane,* and simply held that the complaint stated a cause of action under the *Mullane* rule without deciding that the notice was or was not sufficient "under the circumstances."

The United States Supreme Court in *Mullane* and the California Appellate Court in *Dohrmann* were considering the sufficiency "under the circumstances" of notice by publication in a newspaper, and notice by posting, respectively. And in each case, the Court was talking about *known persons with known addresses.* Note the language used in *Dohrmann* [8 Cal.App.3d 655 at 664, quoting from *Mullane,* 324 U.S. at 319; 94 L.Ed. at 875]:

> "As to known persons with known addresses, (e)xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

Petitioners were *known* persons, but their address was *not known* to the tax collector. To find the "true address" that the petitioners talk about in their brief from county records, the tax collector would have been required to ascertain that one of the petitioners, namely, Marie Offenberg, owned another parcel of property in San Bernardino County, and that she was the Marie Offenberg who, together with Max Offenberg, owned the Big Bear parcel. He would then have been required to discover the form filed with the county tax assessor by Marie Offenberg on December 9, 1969, showing a change of mailing address for tax statements from 127 Utah Street, Los Angeles, to 1107 West Beverly Boulevard, Montebello. No decisions cited by petitioners suggest that such extravagant efforts are within the "limits of practicability" under comparable statutory procedures and are thus required to be exerted to impart constitutionality to a tax sale. A significant "circumstance" in this case is that we are dealing with a time-tested, comprehensive statutory scheme designed to stabilize tax titles. See "Taxation: A Delicately Planned Arrangement of Cargo," Sabine, (1965) 53 Cal.L.Rev. 173. But it is a scheme, nonetheless, which gives the taxpayer a very adequate oppor-

tunity to redeem his property by payment of his taxes. Like any effective tax law, some minimal cooperation is required of the taxpayer to make the system function. Several California decisions suggest that there is a civic duty to pay the just taxes on one's property and to call the attention of taxing authorities to irregularities in respect thereto. See, e.g., *Litchfield v. County of Marin* (1955) 130 Cal.App.2d 806, 280 P.2d 117.

The trial court found that the taxpayers here were estopped to question the validity of the deed for their failure to take any steps to discover why they were not receiving tax statements, for their failure to notify the assessor of their correct mailing address, and for their failure to pay any taxes on the property during the seven-year period they exercised the privileges of ownership of the property. As the Court of Appeal below pointed out, the taxpayers were in fact well aware of their non-receipt of tax statements and inferred therefrom that their property had escaped assessment. Shortly before the tax sale, they informed the tax assessor of their change of address from Utah Street, Los Angeles, to a residence address in Montebello, but deliberately withheld such information from the assessor with respect to the Big Bear property. It is these same taxpayers who now urge that special efforts should have been made by the tax collector to ascertain their correct, current address. To find constitutionally insufficient the notice procedures of Section 3701 as an accommodation to deliberate tax-evaders whose long course of conduct was calculated to avoid tax payment would serve to encourage tax evasion and adversely affect the stability of tax titles, a stability achieved in California through years of combined legislative, administrative, and judicial effort. See "Taxation: A

Delicately Planned Arrangement of Cargo," Sabine (1965), 53 Cal.L.Rev. 173.

Respondents Doyle submit that under the circumstances here the notice procedures employed were constitutionally adequate and that no due process question is presented.

Respectfully submitted,

FULLERTON, MORRIS & YAHNKE, INC.
A Professional Corporation
By: ROBERT S. MORRIS
*Attorneys for Respondents Doyle*

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COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

FILED

MAY 31 1972

Clerk

MAX OFFENBERG AND MARIE OFFENBERG,

Plaintiffs and Appellants,

v.

THE STATE OF CALIFORNIA, ET AL.,

Defendants and Respondents.

4 Civil 11634

(Sup.Ct.No.130618)

OPINION

APPEAL from a judgment of the Superior Court of San Bernardino County. Vernon V. Hunt, Sr., Judge.* Judgment affirmed.

Simon, Sheridan, Murphy, Thornton & Hedvena, John D. Cahill and Mike Mayo, for Plaintiffs and Appellants.

Stanford D. Herlick, County Counsel, and Robert W. Walker, Deputy County Counsel, for Defendants and Respondents County of San Bernardino and C. Leon Gregory, Tax Collector.

Fullerton & Morris and Robert S. Morris, for Defendants and Respondents Orville K. Doyle and Leona M. Doyle.

BY THE COURT

Appellants, plaintiffs below, are Dr. Max Offenberg and his wife Marie.

During January 1963 appellants purchased real property at

*Retired judge assigned by the Chairman of the Judicial Council.



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Big Bear in San Bernardino County. The property was assessed for real property taxes as two separate adjoining parcels. The parcel that concerns us here is a 100 by 165 foot lot improved by construction of a substantial mountain cabin. The second parcel was unimproved.

A real property tax was levied on the Big Bear property, attaching as a lien as of noon on the first Monday in March 1963 (Rev. & Tax. Code, § 2192). The tax on the mountain cabin parcel was never paid. On June 30, 1964, the property was sold to the state (Rev. & Tax. Code, § 3436). On July 3, 1969, the tax collector executed a deed conveying the property to the state (Rev. & Tax. Code, § 3511). The tax collector gave notice of intended sale of tax-deeded property pursuant to section 3701 of the Revenue and Taxation Code, which reads as follows:

> "After receiving the written authorization of the Controller and not less than 21 nor more than 28 days, before the proposed sale, the tax collector shall send a notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. To ascertain the address of the last assessee of the tax-deeded property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll."



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notice of intended sale was published in the county seat and in the judicial district in which the property is situated (Rev. & Tax. Code, §§ 3702, 3704). On January 20, 1970, the mountain cabin parcel was sold at public auction to Orville and Leona Doyle, the highest bidders (Rev. & Tax. Code, § 3706). On receiving the full purchase price the tax collector executed a deed to the purchasers (Rev. & Tax. Code, § 3708). The unimproved parcel adjoining the mountain cabin parcel was not sold at the public auction, having been earlier withdrawn from sale for reasons discussed below.

Respondents Doyle wrote appellants that they had taken possession of the cabin and requested appellants to remove their personal property therefrom. This lawsuit followed.

On February 16, 1970, appellants filed a "Complaint to cancel tax deed; quiet title; forcible entry; and conversion," naming as defendants the State of California, the County of San Bernardino, the county tax collector, and the Doyles. The state filed a disclaimer. The county and the tax collector answered. The Doyles answered and cross-complained to quiet their title against the appellants. The matter was tried to the court. Findings of fact and conclusions of law were made and judgment was given that appellants take nothing by their complaint and that title to the property be quieted in the Doyles, from which judgment this appeal is taken.

It appeared at the trial that the 1963 tax bill and all



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subsequent bills were sent to appellants at a Yuma, Arizona address. This address appears in the record as the address of the person from whom appellant purchased the property and is likewise the address given for the assessees of the mountain cabin parcel appearing on each assessment roll from 1963 onward. The original deed to appellants included an instruction in the upper lefthand corner that after recording, the deed should be mailed to "Mr. and Mrs. Max Offenberg 127 Utah Street Los Angeles, California." As part of the routine preliminaries to the public auction, the tax collector prepared a "tax sale search sheet" which noted the Los Angeles address. At the same time the tax collector sent the notice of intended sale to the Yuma address by registered mail, he sent a "courtesy notice" to the Los Angeles address by regular mail.

The Los Angeles address was the location of a hospital formerly owned by Dr. Offenberg. Dr. Offenberg had sold the hospital in October 1969, at which time he requested the post office to forward any mail. The notice sent to Los Angeles never reached appellants. The notice sent to Yuma was returned marked "Moved - left no address."

It also appeared at the trial that appellants were knowledgeable in real estate matters, as evidenced by their ownership of approximately eight parcels of real property in Los Angeles County and other real property at Hesperia in San Bernardino County. Mrs. Offenberg testified that she did not receive a tax bill for 1963 or any subsequent year on the Big Bear property. She was aware of the necessity of keeping the tax authorities advised of a current address since duri



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ecember 1969, in respect to the Hesperia property only, she otified the San Bernardino County Tax Assessor to discontinue ending the tax bills to the Los Angeles address and to send them o a Montebello residence address. Although Dr. Offenberg testified hat he relied on his auditors to "take care of all the taxes and so orth," the record permits the inference that appellants failed to ay the taxes because they believed that the property had escaped ssessment.

To begin, the deed to the state transfers title to the state he same in effect as a voluntary grant (Sears v. County of Calaveras, 5 Cal.2d 518, 522), leaving the former owner with a statutory right of edemption only (Rev. & Tax. Code, § 4101). On completion of the sale fter the deed to the state, the right of redemption is terminated ev. & Tax. Code, § 3707). There is no constitutional right of edemption, which comes entirely from the statute and is subject to l the limitations and conditions therein imposed (Peterson v. hnson, 39 Cal.2d 745, 748). The Legislature might have adopted a heme of disposing of tax-deeded property without notice given to e delinquent taxpayer of intention to do so (Smith v. Furlong, 160 l. 522, 529). As it is the statute does require notice both by il and by publication. There was substantial evidence that the quirements of the statute concerning notice were fully complied th.

The trial court found against appellants on the allegation



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that when the tax collector noted the Los Angeles address he "discovered the true address" of the appellants, and was accordingly obliged to give notice to appellants to the Los Angeles address by registered mail.

According to the evidence, the tax collector processed the sale routinely, and did not know whether the Los Angeles address was a correct address or not. This fact could have been determined only by further investigation, which duty the Legislature has not imposed upon the tax collector. The "courtesy notice" was nothing more than the name implies, that is, a voluntary extra effort on the part of the tax collector for the benefit of the delinquent taxpayer. The statutory scheme places the burden on the tax collector to ascertain the address of the last assessee of the tax-deeded property sought to be sold by "an examination . . . made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll." (Rev. & Tax. Code, § 3701). The assessment of the mountain cabin parcel on the 1963-1969 rolls placed in evidence gives the Yuma address for appellants. Notice given to the Yuma address by registered mail constituted full compliance with the law.

Also concerning the notice by mail, appellants placed in evidence the 1969 assessment roll entry for the unimproved parcel adjoining the mountain cabin parcel which was listed separately in the rolls from the mountain cabin parcel. As to this entry, a hand-

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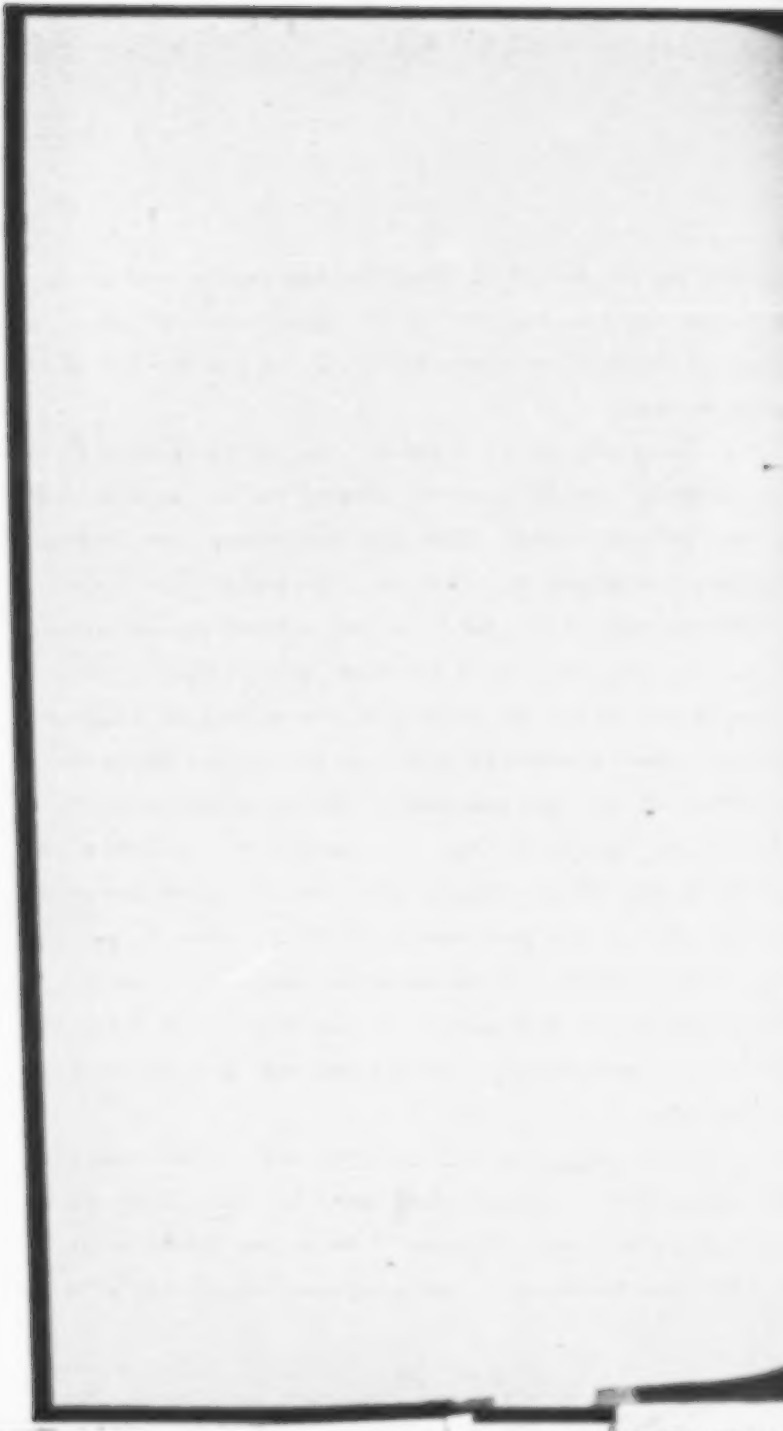

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written notation was made by someone in the tax assessor's office on January 10, 1970, ten days before the date set for the tax sale of the mountain cabin parcel, lining through the Yuma address and setting out the Los Angeles address. This moved the tax collector to send a second notice by regular mail to the Los Angeles address. The following explanation was given: "We make every effort to notify the taxpayer, and if one attempt fails, we'll make a second try. [¶] When I found the additional assessee's lot, I sent the second letter." Appellants contend that upon observing the notation of the Los Angeles address on the assessment roll entry for the unimproved parcel, the tax collector should have withdrawn the mountain cabin parcel from sale. Nothing in the Revenue and Taxation Code would compel this result. The notation did not constitute any better evidence than the tax collector already had on hand for purposes of the mailed notice relating to the mountain cabin parcel, which was given in the manner already set forth.

Appellant argues that the published notice was defective. No issue was raised by the pleadings in this regard. Nevertheless the record has been examined and it reveals that the mountain cabin parcel was correctly described in all notices given. The unimproved parcel was not included in the notice published in the judicial district in which the property is situated, and this is the apparent reason why it was withdrawn from sale. Using appellants' own cited standard, "the object of the statute is to notify the owner that the



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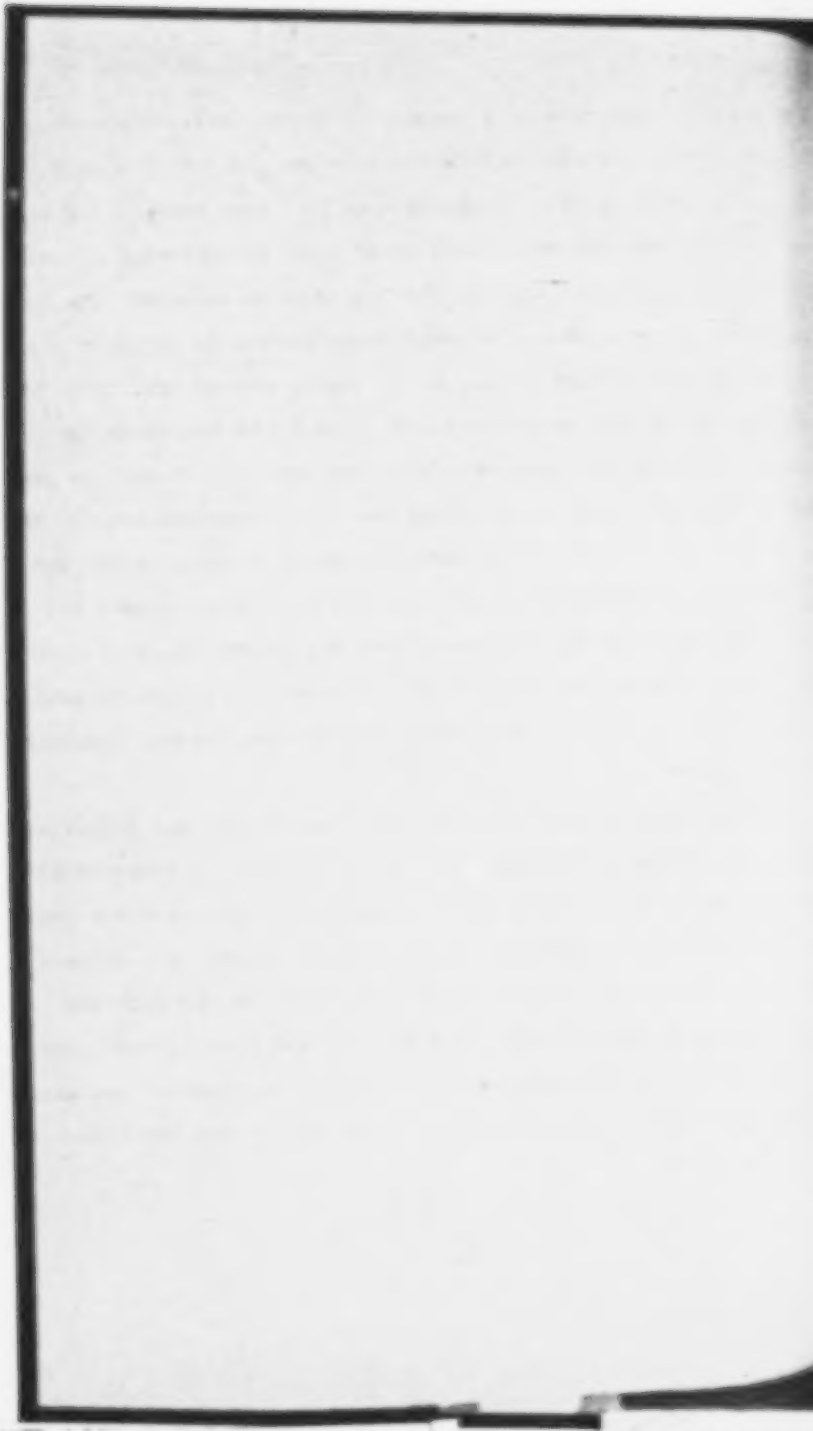

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taxes thereon are delinquent . . . and the description of the lot must be sufficient to give such notice." The purpose of the statutory notice concerning the mountain cabin parcel was thus achieved.

Since the Doyles have good title to the property, the issues concerning forcible entry and unlawful detainer drop out of the case. As far as the question of conversion is concerned, there was substantial evidence that the Doyles asserted no ownership of appellants' personal property found in the cabin; there was no evidence that the Doyles exercised any wrongful dominion over such property. Any incidental use of appellants' property was attributable to the fact that appellants failed to honor the request to remove the same.

The judgment is affirmed.

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APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUL 26 1972

DEAR SIR: *I have this day filed Order*

In re: 4 Civ. No. 11634

Offenberg

on
State of California
Co. of San Bernardino

*Respectfully,*

G. E. BISHEL
*Clerk*

COPY

NOV 25 1972

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1972
No. 72-659

MAX OFFENBERG and MARIE OFFENBERG, husband and wife,

*Petitioners,*

*vs.*

THE STATE OF CALIFORNIA; THE COUNTY OF SAN BERNARDINO; G. LEON GREGORY, Tax Collector of the County of San Bernardino; ORVILLE K. DOYLE and LEONA M. DOYLE, husband and wife,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

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**IN THE**
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MAX OFFENBERG and MARIE OFFENBERG, husband and wife,

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THE STATE OF CALIFORNIA; THE COUNTY OF SAN BERNARDINO; G. LEON GREGORY, Tax Collector of the County of San Bernardino; ORVILLE K. DOYLE and LEONA M. DOYLE, husband and wife,

*Respondents.*

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

The opening paragraph of petitioners' brief includes two serious misstatements which do not put this matter in its proper perspective.

FIRST, the following phrase on page 1 of petitioners' brief is misleading: "*notice* to a *property owner* (of the government's intention to sell *his* property for taxes)." That statement is

incorrect because the record is clear that the property in question in this litigation had been deeded to the State of California on July 3, 1969 and, therefore, Petitioners' were not the owners of, and did not have title to the property in question when the "notice" [of the sale at public auction] referred to by petitioners was given.

SECOND, in the same paragraph, Petitioners refer to "a known incorrect address" and "knowledge of the property owner's correct address." As to such "knowledge" the California Appellate Court stated: "The notation [of a former address of petitioners] did not constitute any better evidence than the tax collector already had on hand for purposes of the mailed notice."

Petitioners desire to impute their knowledge to the Tax Collector's office, although for seven years they never notified the Tax Collector's office as to what their correct address was, and never paid any taxes on the property in question during that period of time.

**Preliminary Statement**

Contrary to petitioners' Preliminary Statement, this case is not involved with "the government's power to divest a citizen of his title to property" but the central issue is related to the *statutory requirements* of notice imposed by the State legislature when property, which has already been deeded to the State for delinquent taxes, is to be sold at public auction. The complaint and the record show that no issue was raised as regards the deed to the State.

It is, therefore, respectfully submitted that the central issue is concerned with *statutory due process* and *not Federal Constitutional Due Process.*

## Grounds for Denying Petition

Inasmuch as the central issue relates to statutory due process, rather than Federal Constitutional Due Process, the grounds for the petition are not present.

## Question Presented for Review

These respondents disagree with the wording of petitioners' brief in the above - entitled section [Pet. Brief, p. 2] because it refers to the property as still owned by the petitioners, rather than the State, when it was sold at public auction. The fact is that title and ownership were held by the State when the procedural steps were taken for the sale of the tax delinquent property at public auction.

The question to be factually correct should read:

Did the government illegally deprive petitioners of their *former* property, which had already been deeded to the State, and deny them due process of law, when it sold *said* property for delinquent taxes after complying with the statutory requirements as to notice?

## Supplementation to Statement of the Case

The "Statement of the Case" as set forth in petitioners' brief is not correct because of omissions which are crucial to a full understanding of the factual situation.

On page 4 of petitioners' brief is the following statement:

"Petitioners were totally unaware of the county's error in transcribing an incorrect address on the assessment records in 1963 and the years thereafter and, thus, were not in a position to call the error to the attention of county officials."

Petitioners may not have known the reason why they did not receive tax bills, but they knew they were not receiving them.

The evidence is clear in this case that Mrs. Offenberg knew the tax situation in respect to the property which was sold at public auction because on February 5, 1970, the day after she learned of the sale, she made the following admission to the following question: [R. Tr. p. 137, 1.20-1.13]

"Q. And didn't you also say that 'I have never been assessed and I never received a tax bill?'

"A. That's right, sir. I didn't receive a tax bill. I did not receive a tax bill."

In addition Mrs. Offenberg filed an address change card on December 8, 1969, for another piece of property but made no attempt to investigate the facts regarding the property which is the subject of this lawsuit. [R. Tr. p. 117, 1.18-22; Exhibit A-D]

Dr. Offenberg knew that he would get assessed, but relied on his auditors to "take care of all taxes and so forth." [R. Tr. p. 119, 1.11]

In view of that testimony, it is incomprehensible to think that the auditors would not be aware of the tax situation, particularly at income tax time when the auditors would be searching for every possible deduction. It is also incomprehensible to understand how having found the nonpayment of the property tax, that the auditors would not have alerted Dr. Offenberg.

Petitioners persist in trying to attribute their knowledge of a "correct" address to the Tax Collector's office. But the California Court of Appeal would not, and did not, buy this argument as evidenced on page 5 of Appendix A in petitioners' brief herein:

"According to the evidence, the tax collector processed the sale routinely, and *did not know whether the Los Angeles address was a correct address or not.* This fact would only have been determined by further investigation, which duty the Legislature has not imposed upon the tax collector. The

"courtesy notice" was nothing more than the name implies, that is, a voluntary extra effort on the part of the tax collector for the benefit of the delinquent taxpayer. The statutory scheme places the burden on the tax collector to ascertain the address of the last assessee of the tax - deeded property sought to be sold by "an examination . . . made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll." (Rev. & Tax Code, Sec. 3701.) The assessment of the mountain cabin parcel on the 1963 - 1969 rolls placed in evidence gives the Yuma address for appellants, *Notice given to the Yuma address by registered mail constituted full compliance with the law."* (Emphasis added.)

Petitioners' brief herein on page 5 states:

"Published notice of the sale in the newspaper published at the county seat likewise proved defective because of an error in the description of the property to be sold."

The California Court of Appeal said the following after examination of the facts (Appendix A to Petitioners' Brief, p. 6):

". . . the record has been examined and it reveals that the mountain cabin parcel was correctly described in all notices given."

## Federal Constitutional Due Process is Not an Issue

**A. Validity of Deed to the State of California is Conclusive.**

Petitioners' complaint in this case did not challenge the deed to the State of California which occurred because the property had been tax delinquent for five years. That deed was executed on July 3, 1969 and recorded with the San Bernardino County Recorder on August 12, 1969. Furthermore there is no evidence in the record challenging the deed to the State.

Therefore, since a full year passed after the deed to the State of California, it is clear the deed to the State is conclusively presumed to be valid under the provisions of California Revenue and Tax Code, Section 175.

The Supreme Court of the State of California commented on the above cited statute as follows in the case of *Sears v. County of Calaveras* (1955) 45 C 2d 518, at p. 522; 289 P 2d 425:

> "The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the land-owner. They also start the running of the *special statute of limitations* applicable to such an owner. [Cal. Rev. and Taxation Code Sections 175 and 3521]. If he does not move to protect his rights as against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, he is divested of his title. *After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.*" (Emphasis added.)

**B. Legal Characteristics of Property Tax - Deeded to the State.**

In order to put the present case in proper perspective it is important to have a clear understanding of the *legal characteristics of property tax - deeded to the state.*

A leading case in this regard is *Mercury Herald Co. v. Moore* (1943) 22 Cal. 2d 269; 138 p. 2d 673. At page 272 of the opinion Justice Traynor said:

> "It is also contended that the right to redeem after the property has been deeded to the state but before it has been sold by the state is a property right, and that the legislation in question deprives the property owner of that right without due process of law. *This contention takes no account of the distinction between the absolute right to redeem within the fixed period of five years from the date of sale to the state, and the conditional right to redeem once the property has been deeded to the state if the state does not sell the property.* The deed to the state upon the expiration of the five-year period conveyed absolute title to the property free of any encumbrance except liens for certain taxes. (Political Code, §3787; R. & T. Code §3520) *Upon execution of the deed the property owner forfeited all rights in the property except the privilege of redeeming it at any time before the state disposed of it.* (Various cases) *The property owner thereafter had at most an offer enabling him to regain title to the property, which could be revoked by the state at any time before acceptance.*" (Emphasis added.)

In respect to redeeming tax - deeded property from the state, Justice Traynor made the following statement in *Peterson v. Johnson* (1952) 39 C 2d 745; 249 P2d 17; at page 748:

> "If the property is thereafter sold to the state for nonpayment of the tax, it can be redeemed only upon the terms prescribed by the Legislature. *'There is no*

*constitutional right to redeem property that has been sold to the state for the nonpayment of taxes. "The right of redemption comes entirely from the statute, and is subject to all the limitations and conditions therein imposed." (Quinn v. Kenney,* 47 Cal. 147, 150.)' (*Sutter - Yuba Inv. Co. v. Waste,* 21 Cal 2d 781, 785 [136P.2d 11].)" (Emphasis added.)

In the light of the above statement saying " 'The right of redemption [of tax - deeded property] comes entirely from the statute, . . .' " the following statement from Justice Carter, in a concurring opinion in the *Mercury - Herald Co. v. Moore* case, supra, at page 281 merits the most serious consideration in this case:

"It appears to be well settled in this state that the right to recovery upon a purely statutory right can be impaired or abrogated without violation of any right guaranteed by the state or federal Constitutions." [Various cases cited.]

Therefore, in the present case, since the defendant County and its Tax Collector adhered to the statutory provisions imposed by the Legislature in disposing of tax - deeded property, all the legal requirements have been satisfied, and no due process rights were abridged. This conclusion is reinforced by the case of *Litchfield v. County of Marin* (1955) 130 C. A. 2d 806; 280 P2d 117; wherein it is stated at the bottom of page 816:

"It [notice of sale *by the state* and not notice of transfer of title by *deed to the state**] is not therefore jurisdictional in nature for *after title has passed to the state and right of redemption terminated [leaving only a privilege of redemption*] the state may without violating any rights of*

*due process sell the property with or without notice to any individual property owner by simply complying with legislative requirements.* (*Mercury Herald Co. v. Moore*, 22 Cal. 2d 269 [138 P. 2d 673, 147 A. L. R. 1111]; *Jacoby v. Wolff*, 198 Cal. 667 [247 P. 195]; *City of Compton v. Boland*, supra, 26 Cal. 2d 310.)"

*Inserted to clarify meaning. (Emphasis added.)

**C. Statutory Notice Requirements as to Mailed Notice.**

Cal. Rev. and Tax. Code Section 3701 sets forth the requirements as to notice by mail for the sale at public auction of property which had previously been deeded to the state for delinquent taxes, as follows:

"After receiving the written authorization of the Controller and not less than 21 nor more than 28 days before the proposed sale, the tax collector shall send notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. *To ascertain the address of the last assessee of the tax - deeded property an examination shall be made of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.*" (Emphasis added.)

**D. Statutory Notice Requirements were Achieved.**

As to petitioners' arguments in respect to published notice, the California Court of Appeal, Fourth Appellate District, Division Two, disposed of that contention as follows (Appendix A, p. 6 of petitioners' Petition for the Writ of Certiorari):

"Appellant argues that the published notice was defective. No issue was raised in the pleadings in this regard. Nevertheless the record has been examined and it reveals that the mountain cabin parcel was correctly described in all

notices given. . . . Using appellants' own cited standard, "the object of the statute is to notify the owner that the taxes thereon are delinquent . . . and the description of the lot must be sufficient to give such notice." The purpose of the statutory notice concerning the mountain cabin parcel was thus achieved."

**E. Substantial Evidence Indicates These Respondents Fully Complied with Notice Requirements.**

The California Court of Appeal, Fourth Appellate District Division Two, succinctly summarized the question as to notice as follows (Appendix A, p. 4, of petitioners' Petition for the Writ of Certiorari):

"To begin, the deed to the state transfers title to the state the same in effect as a voluntary grant (*Sears v. County of Calaveras,* 45 Cal. 2d 518, 522), leaving the former owner with a statutory right of redemption only (Rev. & Tax. Code, §4101). On completion of the sale after the deed to the state, the right of redemption is terminated (Rev. & Tax. Code, §3707). There is no constitutional right of redemption, which comes entirely from the statute and is subject to all the limitations and conditions therein imposed (*Peterson v. Johnson,* 39 Cal. 2d 725, 748). The Legislature might have adopted a scheme of disposing of tax - deeded property without notice given to the delinquent taxpayer of intention to do so (*Smith v. Furlong,* 160 Cal. 522, 529). As it is the statute does require notice both by mail and by publication. There was substantial evidence that the requirements of the statute concerning notice were fully complied with."

**F. United States Supreme Court Cases**

**(1) Collection of Public Revenue is not governed by Judicial Due Process Principles.**

*Cincinnati, N.O. & T.P.R. Co. v. Kentucky* (1885) 115 U.S. 321; 6 S. Ct. 57; 29 L. Ed. 414.

115 U. S. p. 331:

"It has, however, been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial; and that "due process of law," as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals."

**(2) Summary Remedies May be Used in the Collection of Taxes.**

*King v. Mullins* (1898) 171 U. S. 404; 18 S. Ct. 945; 43 L. Ed. 214.

171 U. S. p 429:

". . . If this be true it would seem to follow necessarily that if the statutes of the state, in connection with the Constitution, gave the taxpayer reasonable opportunity to protect his lands against forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.

"Much of the argument on behalf of the plaintiff proceeds upon the erroneous theory that all the principles involved in due process of law as applied to proceedings strictly judicial in their nature apply equally to proceedings for the collection of public revenue by

taxation. On the contrary, it is well settled that very summary remedies may be used in the collection of taxes that could not be applied in cases of a judicial character."

**(3) California Statutory Procedure Approved.**

*Chapman v. Zobelein* (1915) 237 U. S. 135; 35 S. Ct. 518; 59 L. Ed. 874.

237 U. S. p 136:

"The laws of California provide a means by which the owner of property can be heard before the board of equalizers as to the fairness of the tax assessment. If no objection is made and the taxes are not paid a delinquent list is published. If default still continues, the property, instead of being offered to the highest bidder, is sold to the state, which holds the "absolute title as of the date of the expiration of five years from the time of the sale." During that period the owner has the right to redeem by paying the original and accrued taxes, penalties, and interest. It is, however, not the policy of the state to retain separate parcels of land; and if the owner does not redeem within the five years, and if the state has not otherwise disposed of the same, the statute provides that the land, or so much thereof as the comptroller may think necessary, shall, after public advertisement and notice to the owner, be sold to the highest bidder."

237 U. S. p 139:

"The plaintiff's contention must be limited to a consideration of the attack on the proceedings in which his lot was sold in 1905. And, without undertaking to consider the essentials of a valid forfeiture of property for nonpayment of taxes, it is sufficient to say that, in the

present case, the statute gave an opportunity to be heard as to the fairness of the original assessment. It gave notice of the time and place at which the property would be sold to the state, subject to the owner's right to redeem during a period of five years. Under the California decisions the first sale, at the end of five years, vested the state with the title. King v. Mullins, 171 U. S. 417, 436, 43 L. ed. 219, 226, 18 Sup. Ct. Rep. 925. See also 2 Cooley, Taxn. 3d ed. 862. The present case is even stronger, for this is a bill attacking the title of the purchaser who bought at the second sale, after notice had been given to the owner, by publication and mail, of the time and place when it would occur – his right to redeem continuing up to the time the state actually entered or sold. Santa Barbara County v. Savings & L. Soc. 137 Cal. 463, 70 Pac. 457. Certainly such a sale, after the finding by the comptroller of the amount of taxes due, and after public and special notice to the owner, would "work the investment of the title through the public act of the government. ... The sale was the public act which is equivalent to office found." King v. Mullins, supra. That case shows that the defendant was not deprived of his property without due process of law, in violation of the 14th Amendment. All other questions raised by the record are concluded by the decision of the state court. The judgment of the Supreme Court of California is affirmed."

## Conclusion

In petitioners' Conclusion (p. 22 of petitioners' brief) the following statement is set forth:

> "Only the State of California had the courage to recognize the gross injustice of what had occurred and true to its convictions it filed a disclaimer in favor of petitioners."

It is correct that the State of California filed a disclaimer in this case, but there is not one shred of evidence in the record as to the reason why the State of California filed the disclaimer.

The evidence shows that the County officials meticulously followed the required statutory procedures, and that they did not have actual knowledge of the "correct" mailing address of petitioners. A review of the evidence moved the California Court of Appeal to say (p. 4, Appendix A, petitioners' brief): "the record permits the inference that appellants failed to pay the taxes because they believed that the property had escaped assessment." The law is clear that there is no issue of Federal Constitutional Due Process in this case.

Wherefore, respondents pray that the application for writ of certiorari be denied.

Dated: San Bernardino, California
November 24, 1972

Respectfully submitted,
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## PROOF OF SERVICE

I, Robert Ross Walker, a Deputy County Counsel for the County of San Bernardino, State of California, a member of the bar of the Supreme Court of the United States, hereby certify that, on the 24th day of November, 1972, I served copies of the foregoing "Brief in Opposition to Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division Two" on the several parties thereto as follows:

1) On Max Offenberg and Marie Offenberg, husband and wife, Petitioners, by mailing copies in a duly addressed envelope, first class postage prepaid, to their attorneys as follows:

Mike Mayo, Esquire
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"Of Counsel" for Petitioners (3 copies)

2) On the State of California, Defendant and Respondent, which filed a Disclaimer, by mailing copies in a duly addressed envelope, with air mail postage prepaid, to its attorneys, as follows:

Evelle V. Younger, Attorney General
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Ernest P. Goodman, Assistant Attorney General
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Attorneys for disclaiming
Defendant and Respondent,
The State of California (3 copies)

3) On Orville K. Doyle and Leona M. Doyle, husband and wife, Defendants and Respondents, by mailing copies in a duly addressed envelope, first class postage prepaid, to their attorney, as follows:

Robert S. Morris, Esquire
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It is further certified that all parties required to be served have been served.

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